IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 376

FREDERIC W. PROCTER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

FREDERIC W. PROCTER,
Petitioner, Pro Se.

THOMAS H. FISHER,
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UNITED STATES LAW PRINTING COMPANY, CHICAGO

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To the Honorable, the Supreme Court of the United States:

Summary Statement of Matter Involved.

Your Petitioner, Frederic W. Procter, praying for a writ of certiorari to review a decision in the United States Circuit Court of Appeals for the Fourth Circuit, respectfully submits:

This is a gift tax case. On January 13, 1939 petitioner executed an Indenture of Trust, appearing on pages 25-40

of the Transcript of Record. This Trust Indenture recited that petitioner was the owner of "a vested future estate" in the *inter vivos* trust established by petitioner's grandfather, Harley T. Procter, on December 29, 1914 and another "vested future estate" in the testamentary trust established by Article Sixth of the Last Will and Testament of Harley T. Procter which was probated in New York County on June 4, 1920 (R. 25-6).

The description of the first trust remainder as "vested" was erroneous, for it was a "contingent remainder" which would vest *only* if petitioner survived his mother, the life tenant (R. 36). The second trust remainder was subject to divestment if petitioner died before his mother or before reaching the age of 40 years (R. 42).

Both remainders were pledged as collateral security to petitioner's *demand* notes totalling $686,300.03 (R. 53) held by his mother. On June 1, 1942 petitioner's mother demanded payment of the $686,300.03 promissory notes (R. 53); and on November 12, 1942 petitioner sued to restrain foreclosure of his trust remainders which were pledged to secure these notes (R. 6).

By the foregoing Trust Indenture, petitioner, "in consideration of his love and affection for his children and his desire to provide for their future" and other considerations, irrevocably transferred, assigned and conveyed to three trustees "so much of all his right, title and interest in and to the trust fund and remainder created by" said *inter vivos* and testamentary trusts "as will remain (a) after the satisfaction and payment of the indebtedness to Lillian S. Procter represented by the aforementioned seven notes (held by petitioner's mother totalling $686,300.03), and (b) after a further deduction, if any

becomes necessary, from said remainders, of the amount provided for in Article 'Eleventh' hereof" (R. 27). The Trust Indenture then provided that petitioner retained a life estate in the trust property, with a remainder to his children (R. 27-8).

After granting the trustees the usual powers it was provided in Article "Eleventh" as follows:

> "Eleventh: The settlor is advised by counsel and satisfied that the present transfer is not subject to the Federal gift tax. However, in the event it should be determined by final judgment or order of a competent Federal court of last resort that any part of the transfer in trust hereunder is subject to the gift tax, it is agreed by all the parties hereto that in that event the excess property hereby transferred which is decreed by such court to be subject to gift tax, shall automatically be deemed not to be included in the conveyance in trust hereunder and shall remain the sole property of Frederic W. Procter free from the trust hereby created."

Under Article "Ninth" the trust was made irrevocable; and under Article "Twelfth" the trust and the indenture were to be "in all respects governed, construed and regulated by the laws of the State of New York" (R. 34-5).

At the time petitioner made the transfer aforesaid he was 36 years of age and his mother was 63 years of age (R. 5). The stipulated value of the corpus of each of the two trusts on the date of the transfer was $928,593.70 in the *inter vivos* trust, and $961,551.68 in the testamentary trust (R. 13).

Petitioner and respondent stipulated before the Tax Court of the United States to two actuarial factors, as follows:

1. The present worth of $1 due at the death of a person aged 36 provided that a person aged 63 years shall have died before the person aged 36 is $0.25152.

2. The present worth of the right to receive $1 at the death of a person aged 36 years provided such death occur after four years and after the death of a person aged 63 years is $0.24883 (R. 16).

Two additional actuarial factors were agreed to by the parties before the Circuit Court of Appeals for the Fourth Circuit, as follows:

3. The present worth of $1 due at the death of a person aged 63 years is $0.56445.

4. The present worth of the right to receive $1 at the death of a person aged 63 years provided such death occur after four years is $0.55377 (R. 74).

There was no actuarial or other evidence in the Record by which the effect of the possible foreclosure and sale of petitioner's remainders under the pledge to secure the $868,300.03 *notes, if valid, could be determined. Nor was there any evidence to show what value, if any, would be left to petitioner after payment of the notes therefrom. The trust assets are securities fluctuating daily in value, so that no human mind can state the "equity", if any, which will remain in the remainders if and when the notes are paid.*

The Commissioner valued the gift to the children at $310,252.32 and assessed a gift tax for the calendar year 1939 in the sum of $36,487.85 (R. 2-3, 8-11, 60-6) under Sec. 501 of the Revenue Act of 1932, c. 209, 47 Stat. 169, and Sec. 502 (as amended by Sec. 301 (a) of the Revenue Act of 1935, c. 829, 49 Stat. 1014); and under Articles 2, 3 and 11 of Treasury Regulations 79 (1936 Ed.). The statute and regulations are set forth in the Appendix hereto.

This cause having been brought before The Tax Court of the United States to defeat the tax, The Tax Court rendered a decision (R. 12-20) computing the gift to the children as follows:

Value of corpus of *inter vivos* trust	$928,593.70	
$.25152 (value of $1 at petitioner's death) times $928,593.70 equals		$233,559.89
Value of corpus of testamentary trust	$961,552.68	
$.24883 (value of $1 at petitioner's death over 40) times $961,552.68 equals		239,263.15
		$472,823.04
Deduct promissory demand notes		686,300.03
Value of gift to children		Zero

Respondent appealed the case to the United States Circuit Court of Appeals for the Fourth Circuit, which rendered a decision on April 11, 1944 (R. 71-7) computing the value of the gift to the children as follows:

Value of corpus, *inter vivos* trust	$928,593.70	
$.56445 times $928,593.70 equals		$524,144.71
Notes	686,300.03	
Deduct	524,144.71	
	$162,155.32	
$162,155.32 divided by $.55377 equals		292,820.70
Value of corpus, testamentary trust	$961,552.68	
Deduct	292,820.70	
	$668,731.98	
$.24883 x $668,731.98 equals value of gift to children		$166,400.57

Since the amount of the gift tax, if any, is still subject to determination by the Tax Court, we do not submit any controversies over the foregoing computations to this Court.

In its opinion the Circuit Court of Appeals held that Article "Eleventh" is contrary to public policy, for reasons hereinafter discussed in the Argument, and is absolutely void.

A petition for rehearing was denied on May 31, 1944 (R. 93).

Statement of Basis of this Court's Jurisdiction.

The decision of the Circuit Court of Appeals for the Fourth Circuit in this case reversing the decision in The Tax Court of the United States directly conflicts upon a question of Federal law with the provisions of Sections 501 and 502 of the Revenue Act of 1932 as amended, and Articles 2, 3 and 11 of Treasury Regulations 79, as well as with the decisions of this Court in the cases of *Smith* v. *Shaughnessy,* 318 U. S. 176 and *Robinette* v. *Helvering,* 318 U. S. 184.

The Questions Presented.

There are two questions presented:

1. Is the remainder interest transferred by petitioner into trust for the benefit of his children such a vague, conditional, contingent and speculative right that it cannot be valued by any "recognized method" and is therefore not subject to the gift tax?

2. Is Article "Eleventh" of the Trust Indenture executed by petitioner absolutely void as against public policy, or is it valid as a condition precedent to the taking effect of the alleged gift?

Reasons for the Allowance of the Writ.

Until the decision in this case, Sections 501 and 502 of the Revenue Act of 1932, as amended, and Articles 2, 3 and 11 of Treasury Regulations 79 have invariably been construed to provide that the conveyance of future interests which are so vague, conditional, contingent and speculative as to be without any possible valuation by any actuarial or other "recognized method" are not intended to be subject to the gift tax. This clearly appears from the opinion of Mr. Justice Black in the case of *Robinette* v. *Helvering*, 318 U. S. 184.

It, therefore, amply appears that the decision of the Circuit Court of Appeals for the Fourth Circuit in this case is *directly in conflict upon a question of Federal law* with Sections 501 and 502 of the Revenue Act of 1932, as amended, and Articles 2, 3 and 11 of Treasury Regulations 79, and with the decision of this Court in the *Robinette* case.

The question involved is important. If taxpayers are to be subject to a gift tax upon transfers of future interests *which have no computable or ascertainable value*, and if the opinion of Mr. Justice Black in the *Robinette* case is to be ignored by the Circuit Courts of Appeals, it should only be upon a square decision by this Court to that effect.

Moreover, if under the right of private property as it has always existed in the United States an owner cannot subject a wholly voluntary transfer thereof to any condition precedent which is not in itself unlawful, such a result should only be reached by a decision of the highest court of the land.

There is no public policy in favor of compelling a donor to make an unconditional gift *which he has no wish to make* merely so as to aid the public Treasury, and thus to compel him to pay a gift tax which he has no willingness to pay.

WHEREFORE petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court, on a day to be designated, the full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States; that said final order of said Circuit Court of Appeals be reviewed or altered by this Honorable Court; and petitioner also prays for such other, further or different relief as may seem proper.

And this petitioner will ever pray, etc.

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